UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BOISE CASCADE CORPORATION,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil Docket No. 96-309-P-C***
	)	
UTICA MUTUAL INSURANCE	***)***	
COMPANY, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

A 1990 accident involving construction worker Dale Pellerin at the Rumford, Maine paper mill owned by plaintiff Boise Cascade Corporation ("Boise") and a resulting negligence action in state court against Boise provide the backdrop to this proceeding, which pits Boise against the contractor that employed the injured worker and the company that provided certain insurance coverage in connection with the construction project. The instant action was originally filed in state court and was removed here by defendant Utica Mutual Insurance Company ("Utica"), where it proceeds in diversity. Each defendant — Utica and Chemipulp Process, Inc. ("Chemipulp") — has separately moved for summary judgment on all counts. For the reasons that follow, I recommend that both motions be denied.[1]

In its amended complaint (Docket No. 38), Boise asserts five counts. Count I seeks a judicial

[1] Utica and Boise have each moved for oral argument in connection with the pending summary judgment motions (Docket Nos. 17 and 33). In my opinion, the written submissions of the parties are sufficient for fully and fairly resolving the issues raised. Therefore, the requests for oral argument are denied.

determination that Utica is obligated to indemnify Boise for the entire amount of the judgment obtained by Pellerin against it in state court once that judgment becomes final. Count II requests a declaration that Utica is obliged to defend and indemnify Boise in connection with a separate action, commenced in the U.S. District Court for the District of Massachusetts, against Boise by Stone & Webster Engineering Corp. ("Stone & Webster"), which served as construction manager for the project at the Rumford mill. Count III is a claim for reformation of the insurance policy that forms the basis of Counts I and II, to the extent that Utica is not otherwise liable on Count II. Count IV is a claim against Chemipulp for breach of contract, alleging that Chemipulp failed to acquire liability insurance covering Boise in connection with the construction project as required by the contract between Boise and Chemipulp. This claim specifically seeks damages including but not limited to the extent of Boise's liability to Stone & Webster. Finally, Count V seeks a declaration that Chemipulp is obliged to indemnify Boise for Boise's civil liability to Pellerin and/or Stone & Webster.

Chemipulp has asserted a crossclaim (Docket No. 7) against Utica, alleging that Utica breached its contract of insurance with Chemipulp by refusing to defend and indemnify Chemipulp as to Boise's claims against it in connection with Pellerin's accident. Additionally, Chemipulp has filed a counterclaim (Docket No. 42) against Boise arising out of Boise's alleged agreement, without informing Chemipulp, that Boise would defend and indemnify Stone & Webster for the latter's negligence. The counterclaim alleges that Boise breached the implied duty of good faith and fair dealing in its contract with Chemipulp and also committed negligent and/or fraudulent misrepresentation. Neither the crossclaim nor the counterclaim is at issue in connection with the pending summary judgment motions.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e).

The Local Rules of this court impose certain procedural obligations on parties that seek summary judgment as well as parties that oppose such a motion. A motion for summary judgment must be accompanied by "a separate, short and concise statement of material facts, supported by

appropriate record citations, as to which the moving party contends there is no genuine issue to be tried." Loc. R. 56.[2] Similarly, a party opposing a summary judgment motion must submit "a separate, short and concise statement of material facts, supported by appropriate record citations, as to which it is contended that there exist a genuine issue to be tried."

I find it necessary to make certain observations regarding the parties' compliance with Local Rule 56. First, I discern in the parties' filings certain factual assertions that do not appear in their respective Local Rule 56 factual statements. "The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein." *Pew v. Scopino,* 161 F.R.D. 1 (D. Me. 1995). Therefore, the only factual assertions I have credited are those appearing in the factual statements. More significantly, three of the four factual statements submitted in connection with the pending motions contain at least some factual assertions that are not supported by appropriate record citations.[3] One of the statements, submitted by Boise in opposition to the Utica summary judgment motion, contains a significant number of such unsupported assertions. When a moving party fails to support its factual assertions in the manner specified, the court must deny the motion to the extent it turns on such assertions. *Donnell v. United States*, 834 F. Supp. 19, 21 n. 1 (D. Me. 1993). When a non-moving party transgresses Local Rule 56 in this manner, that party waives the right to controvert the moving

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[2] The Local Rules were recodified subsequent to the briefing of the pending summary judgment motions. With the exception of the requirement that the statements of material fact referred to therein must be separate from the parties' legal memoranda, the relevant procedural obligations of the parties have not changed as a result of the recodification. Therefore, for the sake of clarity and convenience, citations are to the currently applicable Local Rules.

[3] The exception is the statement of fact filed by Boise in opposition to Chemipulp's summary judgment motion.

party's properly supported factual allegations. *See Winters v. FDIC*, 812 F. Supp. 1, 2 (D. Me. 1993) (discussing absence of factual statement); *McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984) (same). While the court has previously couched its warnings about compliance with Local Rule 56 and its predecessor in terms of judicial efficiency, *see, e.g., Pew*, 161 F.R.D. at 1 ("trial judge cannot comb through every deposition, affidavit, pleading, and interrogatory answer in search of disputed factual issues"), I would also note that laxity as to Local Rule 56 would also work unfairness on the parties themselves. Each party, after all, is entitled to assume the court will rely only on the properly supported assertions made in its opponent's factual statement, rather than have to guess whether the court will look beyond what is legitimately on the playing field. I therefore have ignored any factual assertions that are not supported by appropriate record citations or otherwise properly introduced into the summary judgment record via another party's factual statement.[4]

II. Factual Context

In light of the foregoing, and viewing the facts in the light most favorable to Boise as the non-moving party, the record reveals the following:

In 1988 Boise entered into two contracts that are central to this case: (1) a contract with

[4] The only exception I have reluctantly indulged is in crediting a lengthy quotation, appearing in Chemipulp's Statement of Material Fact, of the indemnification clause of its contract with Boise. *See* Defendant Chemipulp, Inc.'s Motion for Summary Judgment and Incorporated Memorandum of Law ("Chemipulp Memo") (Docket No. 22) at 4-5. This quotation is devoid of citation to the record. However, the language at issue does appear in the record, *see* Exh. 2 to Affidavit of Samuel P. Militello ("Militello Aff.") (Docket No. 23) at Sched. 1.0, and Boise does not contest that the quoted language is, in fact, an accurate excerpt from the contract. In the circumstances it seems reasonable to treat Chemipulp's record citation as an oversight — but not without observing that, had Boise objected to the quoted contract language based on the lack of citation, I would have excluded it from consideration on that basis.

Chemipulp to construct a high density pulp storage tank at Boise's mill in Rumford, Maine. Amended Complaint at ¶ 4; Amended Answer and Counterclaim of Defendant Chemipulp ("Chemipulp Answer") (Docket No. 42) at ¶ 4, and (2) a contract with Stone & Webster in which Stone & Webster agreed to serve as construction manager for a general expansion and renovation project at the mill, including the work to be done by Chemipulp, Exh. 1 to Affidavit of William R. VanHole ("VanHole Aff.") (Docket No. 26). Boise's contract with Chemipulp contained a provision requiring Chemipulp to purchase and maintain, from insurers acceptable to Boise, contractor's liability insurance, workers' compensation and employer's liability insurance, general liability insurance, automobile liability insurance and "excess umbrella liability" insurance. Exh. 2 to VanHole Aff. at Sched. 4.0, § 6.1. As to all of these insurance policies except the workers' compensation and employer's liability coverage, Chemipulp was obligated to name Boise, its directors, officers and employees as "additional insureds with respect to liability or any claims of liability arising out of the Work performed by [Chemipulp]." *Id.* at § 6.2.1.

Chemipulp entered into a general liability insurance contract with Utica covering the period from November 15, 1989 to November 15, 1990. Affidavit of Walter C. Trzcinski ("Trzcinski Aff.") (Docket No. 15) at ¶ 3. However, by oversight, Boise was not named as an additional insured on the policy as originally issued by Utica. Letter of Walter C. Trzcinski to Sam Militello, Esq. and Joseph Gunn dated August 3, 1995 ("Trzcinski Letter"), Exh. 10 to Affidavit of William R. VanHole ("VanHole Aff.") (Docket No. 26), at 1. Utica agreed in August 1995 to reform the policy so as to add Boise as an additional insured. *Id.*

The insurance contract, as reformed, listed Boise as an additional insured pursuant to an endorsement added to the contract and numbered "CG 20 09 11 85." Trzcinski Aff. at ¶ 5; Affidavit

of Daniel P. Stedman ("Stedman Aff.") (Docket No. 14) at ¶ 5. Endorsement form CG 20 09 11 85 was the only such endorsement form used by the National Accounts Division of Utica, which administered this insurance contract, during the relevant period to add third parties to its insurance contracts in connection with the risks associated with construction projects. *Id.* at ¶ 6. The endorsement contained an exclusion of coverage for ""bodily injury" or "property damage" arising out of any act or omission of [Boise] or any of [its] employees, other than the general supervision of work performed for [Boise] by [Chemipulp]." Exh. 2 to Trzcinski Aff. at ¶ 2(B)(3). A further exclusion enumerated in the endorsement applied to ""bodily injury" or "property damage" for which [Boise is] obligated to pay damages by reason of the assumption of liability in a contract or agreement." *Id.* at ¶ 2(B)(1). By its terms, this exclusion "does not apply to liability for damages that [Boise] would have in the absence of the contract or agreement." *Id.*

The endorsement also provided that the so-called "employee exclusion" in the Chemipulp policy applied to the coverage of Boise as an additional insured. *Id.*; Trzcinski Aff. at ¶ 7. The employee exclusion eliminated coverage for, *inter alia*, ""bodily injury" to . . . [a]ny employee of the insured arising out of and in the course of employment by the insured." *Id.* at ¶ 6. By its terms, the "employee exclusion" applied "[w]hether the insured may be liable as an employer or in any other capacity" and "[t]o any obligation to share damages with or repay someone else who must pay damages because of the injury." *Id.* However, the policy provided that the employee exclusion did not apply "to liability assumed by the insured under an 'insured contract.'" *Id.* For this purpose, the policy defined "insured contract" as

> [t]hat part of any other contract or agreement pertaining to [Chemipulp's] business under which [Chemipulp] assume[s] the tort liability of another to pay damages because of "bodily injury" or "property damage" to a third person or organization, if

> the contract or agreement is made prior to the "bodily injury" or "property damage." Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Id.

The construction contract between Boise and Chemipulp provided that Chemipulp would indemnify and defend Boise as to claims

> through any wrongful act or omission, fault or negligence of [Chemipulp], or anyone acting under its direction, control or on its behalf in connection with or incident to the Work, unless the claim is caused by the joint, concurring or contributory negligence, whether active or passive, of [Boise] or any other person or persons or the sole negligence or willful misconduct of the party indemnified or held harmless, in which event [Chemipulp] will provide said indemnification to the extent or degree it is found to be the cause or liable for the claim.

Exh. 2 to Militello Aff. at Sched. 1.0. This provision of the contract further provided that "acts referred to as being those of Boise Cascade or [Chemipulp], as the case may be, shall include acts of each such party's directors, officers, employees, agents, representatives, subcontractors or assigns." *Id.* It also contained an express waiver of any immunities, or right to receive contribution from Boise, enjoyed by Chemipulp pursuant to Maine workers' compensation law. *Id.* Finally, the provision contained language specifying that, to the extent any loss suffered by Boise is not covered by the indemnity provisions of the Chemipulp contract, Boise and Chemipulp intend that it "nonetheless be compensated by and to the extent of the insurance coverage purchased or required to be purchased" by Chemipulp. *Id.*

On or about August 22, 1990, Chemipulp employee Dale Pellerin sustained serious injuries when he fell from scaffolding at the pulp storage tank construction site. Amended Complaint at ¶ 6;

Amended Answer of Chemipulp (Docket No. 42) at ¶ 6.[5] In March 1996, the Maine Superior Court (Oxford County) entered judgment in favor of Dale Pellerin in the amount of $1.4 million following jury trial in a negligence action, Dale Pellerin v. Boise Cascade Corp and Stone & Webster Engineering Corp. Docket Record, Pellerin v. Boise Cascade et. al., Docket No. CV-92-35, Exh. 1 to Defendant Utica Mutual Insurance Company's Memorandum of Law in Support of its Motion for Summary Judgment, etc. ("Utica Memorandum") (Docket No. 13) at [14]. The jury returned a special verdict form, finding both Boise and Stone & Webster negligent, reducing its original damages assessment of $1.75 million by $350,000 to account for Pellerin's own negligence, and determining that the negligence of the defendants in the action should be apportioned 20 percent to Boise and 80 percent to Stone & Webster. Jury Verdict Form, Exh. 3 to Utica Memorandum. The matter is presently on appeal to the Law Court. Docket Record at [16].

The extent to which the various parties to the instant litigation were and are responsible for defense and indemnification in connection with the Pellerin lawsuit was the subject of discussion among Boise, Chemipulp and Utica well before the trial in state court. In January 1993, some two years before Utica acknowledged the inadvertent exclusion of Boise as an additional insured on the Chemipulp policy, counsel to Chemipulp advised Boise in writing that Utica had agreed to defend and to indemnify Boise. Letter of Samuel P. Militello, Esq. to Peter Culley, Esq. dated January 20, 1993, Exh. 6 to VanHole Aff.; Militello Aff. at ¶ 1 (identifying Militello as counsel to Chemipulp). When Walter C. Trzcinski of Utica wrote to counsel for Chemipulp in August 1995 to confirm that

[5] Utica has not admitted this allegation in the Amended Complaint. *See* Amended Answer of Utica (Docket No. 41) at ¶ 6 (averring that Utica is without sufficient knowledge concerning this allegation). It does not appear that any of the parties are in dispute that Pellerin was employed by Chemipulp and that he was seriously injured at the work site on the date in question.

Utica would reform its insurance contract with Chemipulp to add Boise as an additional insured, he explicitly took the position on behalf of Utica that the insurance contract, as reformed, would not require Utica to defend or indemnify Stone & Webster. Trzcinski Letter at 2-6. However, Trzcinski did not on that occasion assert that Utica would refuse to defend or indemnify Boise.

On February 11, 1996, a week before trial commenced in the Pellerin case, Associate General Counsel William R. VanHole of Boise wrote to Trzcinski to demand that Utica "offer sufficient sums to settle all claims against Boise Cascade and to protect Boise Cascade from any and all loss in this matter up to the limits of the applicable insurance policies." Letter of William R. VanHole to Walter Trzcinski dated February 13, 1996, Exh. 11 to VanHole Aff., at 2. VanHole advised Trzcinski that Pellerin's attorneys had expressed a willingness to settle the matter "for an amount well within the available insurance coverage." *Id.* On February 23, the fourth day of the Pellerin trial in state court, Trzcinski responded to VanHole by indicating that, from Utica's standpoint, the trial was "not going badly" and, therefore, Utica was not willing to settle the claim against Boise in the monetary range suggested by VanHole.[6] Letter of Walter Trzcinski to William R. VanHole, Esq. dated February 23, 1996, Exh. 12 to VanHole Aff., at 2. In his letter, Trzcinski made no mention of any assertion by Utica that it would not ultimately indemnify Boise to the full extent of Boise's liability to Pellerin. By letter dated February 26, VanHole reiterated his demand that Utica settle the Pellerin case. Letter of William R. VanHole to Walter Trzcinski dated February 26, 1996, Exh. 13 to VanHole Aff. Trzcinski responded on February 29 with his assessment that "the trial is going well

[6] This correspondence between VanHole and Trzcinski explicitly discusses possible settlement amounts and their various opinions as to Boise's financial exposure in the Pellerin litigation. The letters appear in the record under seal, and I omit mention of these amounts in light of the pendency of the Pellerin matter. *See* Confidentiality Order (Docket No. 27).

as to Boise Cascade" and again refused to settle. Letter of Walter C. Trzcinski to William VanHole, Esq. dated February 29, 1996, Exh. 14 to VanHole Aff. Again, Trzcinski explicitly declared that Utica would not defend or indemnify Stone & Webster but did not refer to any contractual limitation on its obligation to indemnify Boise. *Id.* at 4.

The state court jury obviously did not concur in Trzcinski's assessment of Boise's case. Several months after the verdict, the instant action ensued.

III. The Utica Motion

a. Duty to Indemnify Boise as to Pellerin (Count I)

Utica contends that it is entitled to summary judgment as to Count I because the plain language of the insurance contract excludes any obligation to indemnify Boise for its liability to Pellerin. Utica relies on the language in the contract excluding coverage for bodily injury or property damage arising out of any act or omission of Boise or its employees other than the general supervision of work performed for Boise by Chemipulp. Utica also invokes the contract's so-called employee exclusion.[7]

"The language of a contract of insurance is ambiguous if it is reasonably susceptible of different interpretations." *Cambridge Mut. Fire Ins. Co. v. Vallee*, 687 A.2d 956, 957 (Me. 1996) (citations omitted). "Whether a given insurance contract is ambiguous is a question of law for the court." *Apgar v. Commercial Union Ins. Co.*, 683 A.2d 497, 498 (Me. 1996) (citations omitted). I agree with Boise, and with such authorities cited by Boise as *Western Cas. & Surety Co. v.*

[7] All of the parties appear to proceed from the assumption that Maine law applies to the issues raised in this case, and I therefore so assume as well.

Southwestern Bell Tel. Co., 396 F.2d 351, 353 (8th Cir. 1968), that the term "general supervision" as used in the relevant exclusionary clause of the insurance contract is ambiguous. The term is reasonably susceptible to an interpretation that confines general supervision to the immediate oversight of Chemipulp's work at the mill, but it also reasonably encompasses the provision of a working environment that is not dangerous to Chemipulp's employees.[8] Therefore, consistent with the "well-established" principles of Maine law that "ambiguities in an insurance policy are resolved against the insurer" and that "a liability insurance policy must be construed to resolve all ambiguities in favor of coverage," *Vallee*, 687 A.2d at 957 (citations omitted), there is at least a trialworthy issue concerning whether Boise is entitled to indemnification under the Utica policy notwithstanding the "general supervision" exclusion.

Relying on *United States Fidelity & Guar. Co. v. Rosso*, 521 A.2d 301 (Me. 1987), and two cases from New York, *Consolidated Edison Co. of New York v. United Coastal Ins. Co.*, 628 N.Y.S.2d 637 (N.Y. App. Div. 1995), *leave to appeal denied*, 641 N.Y.S.2d 830 (N.Y. 1996), and *Tardy v. Morgan Guar. Trust Co. of New York*, 624 N.Y.S.2d 34 (N.Y. App. Div. 1995), Utica further contends that the so-called employee exclusion language of the insurance policy precludes any obligation to indemnify Boise as to the Pellerin judgment.[9] The employee exclusion eliminated

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[8] Thus, Utica's reliance on *First Ins. Co. of Hawaii v. State*, 665 P.2d 648 (Haw. 1983), is misplaced. At issue there was the state's negligence in failing to warn the public about the hazards at a highway construction site — an omission the Hawaii Supreme Court quite logically determined could not constitute "general supervision" of the construction firm covered by the liability policy at issue. *Id*. at 424-25.

[9] In support of its position Utica also cites *Lunt v. Fidelity & Cas. Co. of New York*, 139 Me. 218 (1942). *Lunt* is inapposite because there was no dispute in that case as to the meaning of the language of the policy; the case turned on "whether or not the legal relationship of employer and employee" existed between the person who sustained injury and the plaintiffs seeking (continued...)

coverage for bodily injury to "[a]ny employee of the insured arising out of and in the course of employment by the insured." It is undisputed that both Chemipulp and Boise were an "insured" for purposes of this language, and that Pellerin was an employee of only Chemipulp. Therefore, this issue boils down to whether the phrase "the insured" as it is invoked here applied to Boise as well as Chemipulp.

The cases cited by Utica are ultimately unhelpful on this point. In *Rosso*, there was only one party that could conceivably be "the insured" and thus there was no possible ambiguity on that score. *Rosso*, 521 A.2d at 304. The two New York cases present factual scenarios similar to the present controversy, but involved insurance policies that explicitly excluded coverage as to "any employee of any named insured." *Consolidated Edison*, 628 N.Y.S.2d at 637; *Tardy*, 624 N.Y.S.2d at 35. Likewise, the cases cited by Boise all turn not merely on the use of the phrase "any insured" in the exclusionary clause, but also on the existence of a provision elsewhere in the policy providing for severability, i.e., that the insurance policy should be construed as providing separate coverage for each insured party. *See, e.g., General Aviation Supply Co. v. Insurance Co. of North America*, 181 F. Supp. 380, 384 (E.D.Mo.), *aff'd*, 283 F.2d 90 (8th Cir. 1960); *Barnette v. Hartford Ins. Group*, 653 P.2d 1375, 1383 (Wyo. 1982). In its memorandum of law, Boise makes reference to a severability clause in the Chemipulp policy, but this assertion does not appear in Boise's Statement of Material Fact. This alone would permit the court not to consider the severability clause in deciding this issue.

Nevertheless, and even taking into consideration the existence of a severability clause in the

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[9](...continued)
indemnification under their insurance policy. *Id.* at 223.

insurance policy, I agree with Boise that there is at least a genuine issue of material fact as to whether an employee of Chemipulp was an "employee of the insured," as distinct from an employee of any insured, within the meaning the policy. I find the policy to be ambiguous on this point — and my conclusion is buttressed by the public policy considerations set forth in *General Aviation Supply* and *Barnette*. *See General Aviation Supply*, 181 F. Supp. at 384 (noting that employees usually covered by workers' compensation plan as against their employer but not other potential workplace tortfeasors); *Barnette*, 653 P.2d at 1383 (when employer has already paid for workers' compensation coverage and "no good purpose to be served" by additional coverage given exclusivity of workers' compensation remedies). The intent of the parties to the contract on this issue is a matter for the factfinder, particularly given the Maine rules on construction of insurance contracts previously cited. It is therefore not necessary for me to determine whether Boise's liability to Pellerin falls within the "insured contract" exception to the employee exclusion, notwithstanding Boise's contention that this exception is inapplicable.

Moreover, even if there were not genuine issues of material fact as to the meaning of certain language in the insurance policy, the equitable doctrine of estoppel would preclude summary judgment in favor of Utica on Count I. Boise invokes both estoppel and waiver in support of its position. According to Boise, Utica was indicating its agreement to defend and indemnify Boise as to Pellerin from January 1993 until after the jury returned its $1.4 million verdict in Pellerin's favor — never once suggesting that the contract language it now invokes would allow it to avoid satisfying any judgment obtained by Pellerin.

In Maine, the doctrine of waiver applies in the case of a "voluntary or intentional decision to permanently relinquish a known right." *Smith v. Voisine*, 650 A.2d 1350, 1353 (Me. 1994)

(citation and internal quotation marks omitted). As for estoppel, the Law Court has set forth a particular description of its elements in the context of insurance coverage:

> An insurer may be estopped from denying coverage when the party claiming coverage has demonstrated (1) unreasonable conduct of the insurer that misleads the insured concerning the scope of his coverage and (2) justifiable and detrimental reliance by the insured upon the insurer's conduct.

Maine Mut. Fire Ins. Co. v. Grant, 674 A.2d 503, 504 (Me. 1996) (citation omitted).

Citing a series of decisions from other jurisdictions, and averring that it finds no Maine case on point, Utica asks this court to adopt a rule that neither of these equitable doctrines may be used to create insurance coverage where none would otherwise exist. My own research has yielded the Maine rule on the issue. In *Kraul v. Maine Bonding & Cas. Co.*, 559 A.2d 338 (Me. 1989), the Law Court did indeed determine that waiver is inapplicable in such a context, reasoning that an insurance carrier has "nothing to waive," and thus cannot be said to have voluntarily relinquished a known right, in a case where the insured party is "seeking to *create* a contractual provision of coverage." *Id.* at 338-39 (emphasis in original). At that time, the Law Court took care to state that it expressed no view on the plaintiff's alternative theory of estoppel. *Id.* at 339. Notably, the issue of estoppel *was* before the Law Court two years later in the same case. *Kraul v. Maine Bonding & Cas. Co.*, 600 A.2d 389, 391 (Me. 1991). On that occasion, the Law Court affirmed the trial court's refusal to apply estoppel to the insurer's assertion of non-coverage — not because the doctrine could never apply to extend insurance coverage, but because the record would not support a finding of justifiable reliance. *Id.*

My reading of the *Grant* case, and the Law Court's two decisions in *Kraul*, is that Maine law precludes Boise from invoking waiver in these circumstances but not necessarily estoppel. This is

in accord with the only non-Maine case cited by Utica that actually discusses the doctrine of estoppel rather than waiver. As noted by Utica, the Supreme Court of Florida has stated a "general rule" in that jurisdiction to the effect that "estoppel may be used defensively to prevent a forfeiture of insurance coverage, but not affirmatively to create or extend coverage." *Crown Life Ins. Co. v. McBride*, 517 So.2d 660, 661 (Fla. 1987). However, as to the particular issue of whether one may use the theory of equitable estoppel to prevent an insurance company from denying coverage, the court answered that question affirmatively albeit only in very limited circumstances. *Id.* Specifically, the Florida rule is that the theory of promissory estoppel — "a qualified form of equitable estoppel which applies to representations relating to a future act of the promisor rather than to an existing fact" — may be invoked to create insurance coverage "where to refuse to do so would sanction fraud or other injustice." *Id.* at 661-62.

It is not necessary for present purposes to determine that Maine law would limit the applicability of estoppel in such a manner when the case involves the extension of insurance coverage. Rather, it suffices to conclude that the summary judgment record yields a genuine issue of material fact as to whether Boise justifiably relied on statements made by Utica, suggesting that Utica would indemnify Boise, not merely at the critical juncture in the days before the jury returned a sizeable verdict in favor of Pellerin, but all the way back to 1993 — some two years before Utica actually added Boise to the policy as an additional insured *nunc pro tunc*. Thus, even if the narrow Florida rule were applicable there would be a trialworthy issue as to whether the 1993 statement amounted to a promise to indemnify that Utica was thenceforth estopped from refusing to honor.

Further, the facts of record are wholly distinguishable from those presented in *Guilford Indus., Inc. v. Liberty Mut. Ins. Co.*, 688 F. Supp. 792 (D. Me. 1988), *aff'd*, 879 F.2d 853 (1st Cir.

1989) (table), relied upon by Utica. Estoppel was not applicable in *Guilford* because the insurer in that case never affirmatively indicated it would provide coverage and, indeed, waited at most two months to inform the insured that it would deny the claim. *Guilford*, 688 F. Supp. at 796. Thus, there was "never any representation to Plaintiff about coverage which might be construed as misleading," but only a modest delay in asserting non-coverage. *Id.* In these circumstances, there was no basis for invoking an estoppel on the part of an insured that was unable to settle damages claims against it, and otherwise "preserve its community relations," during the two months of uncertainty. *Id.* The facts presented here represent a point very distant from *Guilford* on the estoppel spectrum: repeated affirmative indications that the insurer would provide coverage, both relatively early in the process of dealing with the underlying claim and at a critical juncture at the end of the process, just prior to the return of the state court jury's verdict.

In its reply memorandum, Utica contends that when it agreed in January 1993 to defend and indemnify Boise, it expressly stated that it was acting "subject to the terms and conditions of the Chemipulp policy." Utica Mutual Insurance Company's Reply Memorandum, etc. (Docket No. 29) at 5. This is insufficient to eliminate estoppel as a trialworthy issue. Utica made no reference to this factual data in its Statement of Material Fact. Therefore, for reasons already discussed, the court must disregard it for purposes of evaluating Utica's summary judgment motion.[10] Moreover, even

[10] Indeed, the non-appearance of this "fact" in Utica's Local Rule 56 factual statement is a vivid illustration of the unfairness that would result if the court were to credit the assertion for purposes of Utica's motion. Aware that Utica could have made such a point but did not in its initial summary judgment papers, Boise found it necessary to argue against a non-asserted proposition in case Utica made such an argument in its reply memorandum. *See* Plaintiff Boise Cascade Corporation's Memorandum of Law, etc. (Docket No. 25) at 11 (noting that Utica "presumably asserts" such an argument). The Local Rules are not intended to place a party opposing a summary judgment motion in the position of making the moving party's arguments for it.

if the court were to consider this asserted fact validly part of the summary judgment record, viewing that record in the light most favorable to Boise would still require the court to infer that Utica was simply promising Boise it would be entitled to indemnification under the language of the policy — not that Utica was reserving the right to claim later that it had no duty to indemnify.

b. Duty to Indemnify Boise as to Stone & Webster (Count II)

I am unable to recommend summary judgment in favor of Utica on Count II, but not for the reasons cited by Boise. Utica's summary judgment motion addresses itself to the version of Count II that appears in the original complaint. As so drafted, Count II requested a declaratory judgment that "the insurance policy issued by Utica naming Boise as an additional insured provides coverage for *any* obligation Boise may have to defend or indemnify Stone & Webster in accordance with the contract between Boise and Stone & Webster." Complaint, Exh. A to Notice of Removal (Docket No. 1), at 4 (emphasis added). The Amended Complaint presents a different and more focused issue: whether Utica is obligated to defend and indemnify Boise in connection with a specific action pending in another federal court. The parties have not sought leave to supplement their motion papers so as to add to the summary judgment record factual data concerning the issues raised by the action in the District of Massachusetts. The Amended Complaint is itself unhelpful in this regard. It alleges only that

> [b]oth prior to and after the trial of the Pellerin matter, Stone & Webster has made demand upon Boise for a defense and indemnification pursuant to certain provisions in the contract entered into between Boise and Stone & Webster. Stone & Webster has demanded, *inter alia*, that Boise reimburse it for all costs and attorney fees incurred by Stone & Webster in defense of the Pellerin action. Stone & Webster has commenced an action against Boise in the Federal District Court in Massachusetts seeking this relief.

Amended Complaint at ¶ 10. Other than acknowledging that Stone & Webster has commenced an action in the District of Massachusetts, Utica has denied these allegations and specifically objects to "any attempt to characterize the relief sought in that action." Amended Answer and Affirmative Defenses of Defendant Utica Mutual Insurance Company (Docket No. 41) at ¶ 10.

Without any basis for ascertaining precisely what relief Stone & Webster is seeking against Boise, I must conclude that Utica has failed to demonstrate the absence of genuine factual issues concerning the extent of its obligation, if any, to defend and indemnify Boise in its litigation with Stone & Webster. Further, it would be improvident for the court to undertake to answer the different question to which the summary judgment papers are addressed. *See generally Ernst & Young v. Depositors Econ. Protection Corp.*, 45 F.3d 530, 534-35 (1st Cir. 1995) (court should exercise its "substantial discretion" in deciding whether to grant declaratory relief so as to avoid entanglement in "abstract disagreements") (citations omitted).

c. Reformation (Count III)

Count III of the Amended Complaint articulates an alternative theory of relief presented by Boise: that, to the extent that Utica is not contractually liable to provide the defenses and indemnification requested in the first two counts, Boise is entitled to reformation of the insurance contract so as to impose these contractual obligations. Utica contends it is entitled to summary judgment on this count because Boise cannot prove the requisite mutual mistake.

Maine law provides that an insurance policy may be subject to reformation "[w]here a mutual mistake is shown to exist as to the terms of [the] policy." *Sinclair v. Home Indem. Co.*, 159 Me. 367, 370 (1963). A claim for reformation of a written instrument requires the party asserting it to prove

the existence of a mutual mistake by clear and convincing evidence. *Bryan v. Breyer*, 665 A.2d 1020, 1022 (Me. 1995). "A mutual mistake is one reciprocal and common to both parties, where each alike labors under the misconception in respect to the terms of the written instrument." *Id.* (citations and internal quotation marks omitted). Plainly, and as pointed out by Utica, the "both parties" to which the Law Court refers are those that struck the contractual bargain, i.e., in this instance Utica and Chemipulp. Therefore, according to Utica, reformation is inappropriate because Utica and Chemipulp agree that the insurance policy was not intended by them to provide coverage beyond that which is described in the additional insured endorsement setting forth the policy terms as to Boise.

Once again Utica's position founders on its failure to comply with the procedural rules governing summary judgment motions. In support of its assertion that Utica and Chemipulp are in agreement as to their respective intentions at the time of the making of the insurance contract, Utica cites only the denials, appearing in Chemipulp's answer to the Amended Complaint, of Boise's allegations that Utica is obliged to defend and indemnify Boise as against Stone & Webster under the terms of the contract and that Chemipulp was obligated under its contract with Boise to procure liability insurance and name Boise as an additional insured. I agree with Boise that these factual assertions are an insufficient foundation for summary judgment in favor of Utica on the reformation claim.

First, I point out a deficiency not noted by Boise. The factual basis upon which Utica relies does not appear in its Statement of Material Fact. This alone would be sufficient to deny the summary judgment motion as to this count, for reasons already stated. Moreover, and as contended by Boise, the denials invoked by Utica are not of sufficient evidentiary quality to be cognizable in

a summary judgment proceeding. Fed. R. Civ. P. 56 requires the court to grant summary judgment forthwith when the absence of any genuine issue of material fact, and thus the moving party's entitlement to judgment as a matter of law, is demonstrated by "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Fed. R. Civ. P. 56(c). Although the court is thus "required to view the pleadings in their entirety when passing on a request for summary judgment," 10A Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 2722 at 46 (2d ed. 1983), a moving party may not base its showing on denials contained in the pleadings, especially when those denials are unverified, because "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial," Fed. R. Civ. P. 56 Advisory Committee Notes, 1963 Amendment (discussing Rule 56(e) requirement that non-moving party not rest on allegations in pleadings), *cf. Sheinkopf v. Stone*, 927 F.2d 1259, 1262 (1st Cir. 1991) (verified complaint functional equivalent of affidavit for summary judgment purposes). Although in a summary judgment proceeding a party can "take advantage of any admissions" contained in another party's unverified answer to a complaint, *Ratner v. Young*, 465 F. Supp. 386, 389 (D.V.I. 1979), what Utica asks the court to do is something quite different. It would have the court bind Boise, as the party opposing the summary judgment motion, by denials made in the pleadings of a third party. To do so would be at variance with the letter and the spirit of Rule 56.[11] Utica has failed to demonstrate the lack of any genuine factual issues as to

[11] I also hasten to point out that most of what Boise presents by way of factual data on the issue of reformation is also not cognizable in the summary judgment context. The crux of Boise's position lies in its contention that when Utica added Boise as an additional insured after the fact, it deliberately chose between two forms drafted by the Insurance Services Office and thereby inserted policy language that would favor its position concerning its duty to indemnify Boise. None of these assertions, as they appear in Boise's Statement of Material Fact, are supported by appropriate record (continued...)

Count III.

IV. The Chemipulp Motion

a. The Contract Claim (Count IV)

Next, I turn to Chemipulp's summary judgment motion. Chemipulp first contends it is entitled to judgment as a matter of law on the breach-of-contract claim (Count IV) on statute-of-limitation grounds. Pointing out that Maine law provides a six-year limitation period for contract actions pursuant to 14 M.R.S.A. § 752, Chemipulp contends that Boise's cause of action for breach of contract accrued no later than March 30, 1989 — the date on which Chemipulp states that its contract with Boise was executed. The instant proceeding was commenced in state court in August 1996. *See generally* Affidavit of Charles P. Piacentini, Jr. (Docket No. 5) and exhibits thereto.

Yet again compliance with Local Rule 56 is lacking. The contention in Chemipulp's Statement of Material Fact, that Chemipulp and Boise signed their contract on or about March 30, 1989, is not supported by a citation to the record. According to the allegations made by Boise in the complaint, its position is that the contract was actually made in 1988. Amended Complaint at ¶ 4. Chemipulp's failure to present an adequate factual basis for making the requested determination is, itself, fatal to Chemipulp's request for summary judgment on the breach-of-contract claim.

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[11](...continued)
citations. Fortunately for Boise, when both sides fail to present cognizable evidence in a summary judgment proceeding, the victory goes to the non-moving party.

Subsequent to the briefing on the pending summary judgment motions, Boise filed a separate motion (Docket No. 46) under Fed. R. Civ. P. 56(f) asking the court to defer action on Utica's request summary judgment until after Boise has had an opportunity to depose the Utica official who apparently has knowledge of whether, and if so how, Utica chose between the two available forms. Because I conclude that neither defendant is entitled to summary judgment on the present record, Boise's Rule 56(f) motion is denied.

Boise does not resist Chemipulp's motion on this basis. Rather, Boise contends that the time of the making of the contract is not the point at which a cause of action for breach of contract accrues in Maine for limitation purposes. This is a correct statement of Maine law. *See Whitten v. Concord Gen. Mut. Ins. Co.*, 647 A.2d 808, 810 (Me. 1994) (cause of action for breach of contract accrues on date of alleged breach). In a sense, Boise begs the relevant question. To "provide an insured an indefinite period of time to institute an action against an insurer" is "a situation that statutes of limitations should and do prevent." *Id.* at 811 (citation omitted). There must be some definite, ascertainable point in time when Boise's cause of action accrued or will accrue. *See id.* (cause of action for breach of uninsured motorist policy accrued, at the latest, when plaintiffs made aware insurers had rejected their demands for settlement of specific amount).

But, in pointing out that Chemipulp is not entitled to summary judgment on the contract claim simply by showing (much less by only alleging) that the contract was made more than six years prior to the filing of the complaint, Boise has done all it must here.[12]

In the alternative, Chemipulp takes the position that it is entitled to summary judgment on the contract claim because there is no genuine issue of material fact concerning the essence of the claim, i.e., Chemipulp's compliance with the contract requirement to name Boise and its directors, officers and employees as additional insureds on Chemipulp's liability insurance policy. For this factual proposition, Chemipulp refers the court in its Statement of Material Fact to the relevant contract language and to a certificate of insurance dated November 10, 1989. *See* Chemipulp

[12] *Kasu Corp. v. Blake, Hall & Sprague, Inc.*, 582 A.2d 978 (Me. 1990), cited by Chemipulp, provides no authority to the contrary. *Kasu* simply stands for the proposition that there is no "discovery" rule in a contract case involving an insurance policy, and thus the statute of limitations begins to run when the defendant fails to provide coverage rather than when the plaintiff discovers the lack of coverage. *Id*. at 980.

Memorandum at 3 (asserting in Statement of Material Fact that "Chemipulp duly secured the insurance required by the contract and forwarded copies of the certificates to Boise."); Exh. 4 to Militello Aff. (copy of insurance certificate). Responding, Boise presents a lengthy written argument, again relying in large part on contentions that do not appear as appropriately supported factual assertions in its own Statement of Material Fact, to the effect that Chemipulp is in breach because it allowed Utica to select the wrong standard insurance form among those available to it. This generates much heat, but sheds no light. It suffices to note that the document appearing as Exhibit 4 to the Militello Affidavit identifies Boise only as a "certificate holder" and presents nothing from which the court could even begin to ascertain the extent to which the insurance obtained by Chemipulp met its contractual obligations in this regard to Boise. Chemipulp has completely failed to demonstrate the absence of a material factual issue as to Count IV.

b. Duty to Indemnify Boise (Count V)

Finally, Chemipulp contends it is entitled to summary judgment in its favor on the final count in the complaint, which asks the court to declare Chemipulp obligated to indemnify Boise for any liability either to Pellerin or Stone & Webster. According to Chemipulp, this is so because its contract with Boise limits Chemipulp's indemnification obligation to those claims arising from Chemipulp's own negligence — as opposed to that of Boise, or as opposed to any liability of Stone & Webster that Boise has assumed by contract. Chemipulp characterizes Boise's claim as an effort to require Chemipulp to provide indemnification for Boise's negligence as found by the state court in the Pellerin action.

"[I]ndemnification clauses that appear to indemnify a party for its own negligence are looked

upon with disfavor by the courts, and are construed strictly against extending the indemnification to include recovery by the indemnitee for [its] own negligence." *McGraw v. S.D. Warrren Co.*, 656 A.2d 1222, 1224 (Me. 1995) (citation and internal quotation marks omitted). Therefore, Maine law requires a court to find a duty to afford such indemnification "only where the contract on its face by its very terms clearly and unequivocally reflects a mutual intention on the part of the parties to provide indemnity for loss caused by negligence of the party to be indemnified." *Id.* (citation omitted); *see also Fowler v. Boise Cascade Corp*., 739 F. Supp. 671, 675 (D. Me. 1990) (to same effect), *aff'd*, 948 F.2d 49 (1st Cir. 1991).

Consistent with this rule of strict construction, I agree with Chemipulp that its contract with Boise obligates Chemipulp to indemnify Boise only insofar as Chemipulp was negligent. Contrary to the position asserted by Boise, the unambiguous language in section 1 of the contract to that effect is not overcome or vitiated by the provision elsewhere in the contract that Chemipulp will also indemnify Boise to the extent of the insurance coverage Chemipulp was required to purchase on behalf of Boise.

Nevertheless, contrary to the position taken by Chemipulp, it does not follow that the court must grant summary judgment in Chemipulp's favor on this claim. According to Chemipulp, there is no genuine issue of material fact because Boise has not come forward with any evidence that Chemipulp was negligent. Were this a breach of contract claim rather than a request for a declaratory judgment, Chemipulp's position might well have merit because proof of its negligence would be a condition precedent to any obligation to indemnify Boise based on the disputed clause of the contract. In the present posture of the case, summary judgment in favor of Chemipulp on this claim would amount to a judicial determination that Chemipulp has no duty to indemnify Boise in

any circumstances. This I am unable to determine on the present record. As Boise points out, Chemipulp was not a party to the Pellerin litigation in state court and, thus, the verdict returned there cannot serve to exonerate Chemipulp from any assessment of fault in connection with the accident. I am convinced that resolution of Count V on the present record would be significantly premature. *See Ernst & Young, supra*.

V. Conclusion

A final observation is in order. The chief goal of this litigation is obviously to apportion financial responsibility, consistent with the parties' respective contractual undertakings, for whatever judgment is finally obtained by Pellerin in the underlying state court proceedings. In essence, then, the objective of each party is to end up owing as little as possible. It is consistent with that objective to resolve this case as expeditiously and simply as possible. While it may be that some of the issues presented here, particularly the circumstances surrounding the redrafting of the insurance contract well after the Pellerin accident, do not necessarily lend themselves to summary disposition, most of the matters in dispute involve issues of contract interpretation and insurance law that emphatically *are* amenable to resolution without trial. I therefore regard these summary judgment proceedings as a missed opportunity, caused by all three parties' failure to present the court with an appropriate summary judgment record. I respectfully urge each party to consider whether its interests have been well-served in this regard.

For the foregoing reasons, I recommend that the summary judgment motions of defendants Utica Mutual Insurance Company and Chemipulp Process, Inc. be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this ___ day of April, 1997.

_____

David M. Cohen
United States Magistrate Judge